

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**1:04-cv-05101-HB  
ECF Case**

**TRAVELERS CASUALTY AND  
SURETY COMPANY as Administrator  
for RELIANCE INSURANCE  
COMPANY,**

**Plaintiff,**

**vs.**

**THE DORMITORY AUTHORITY OF  
THE STATE OF NEW YORK, TDX  
CONSTRUCTION CORP. and KOHN,  
PETERSON, FOX & ASSOCIATES, P.C.,**

**Defendants.**

**DORMITORY AUTHORITY OF THE  
STATE OF NEW YORK,**

**Third-Party Plaintiff,**

**vs.**

**TRATAROS CONSTRUCTION, INC.  
and TRAVELERS CASUALTY AND  
SURETY COMPANY,**

**Third-Party Defendants.**

**TRATAROS CONSTRUCTION, INC.  
and TRAVELERS CASUALTY AND  
SURETY COMPANY,**

**Fourth-Party Plaintiffs,**

**vs.**

**G.M. CROCETTI, INC., CAROLINA  
CASUALTY INSURANCE COMPANY,  
BARTEC INDUSTRIES INC., DAYTON  
SUPERIOR SPECIALTY CHEMICAL  
CORP., SPECIALTY CONSTRUCTION  
BRANDS, INC. t/a TEC, KEMPER  
CASUALTY INSURANCE COMPANY  
d/b/a KEMPER INSURANCE**

**COMPANY, GREAT AMERICAN  
INSURANCE COMPANY, NATIONAL  
UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH, PA., UNITED  
STATES FIRE INSURANCE  
COMPANY, ALLIED WORLD  
ASSURANCE COMPANY  
(U.S.) INC. f/k/a COMMERCIAL  
UNDERWRITERS INSURANCE  
COMPANY, ZURICH  
AMERICAN INSURANCE COMPANY  
d/b/a ZURICH INSURANCE  
COMPANY, OHIO CASUALTY  
INSURANCE COMPANY  
d/b/a OHIO CASUALTY GROUP,  
HARLEYSVILLE MUTUAL  
INSURANCE COMPANY  
(a/k/a HARLEYSVILLE  
INSURANCE COMPANY, an insurer  
for BARTEC INDUSTRIES INC.),  
JOHN DOES 1-20, and XYZ  
CORPS. 1-12,**

**Fourth Party Defendants.**

**NATIONAL UNION'S ANSWER TO THE FOURTH-PARTY COMPLAINT,  
AFFIRMATIVE DEFENSES, JURY DEMAND  
AND ANSWER TO CROSS-CLAIMS**

Fourth-Party Defendant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”), as and for its answer to the Amended Fourth-Party Complaint (the “Fourth-Party Complaint”):

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “1.”
2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “2.”
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “3.”

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "4."

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "5."

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "6."

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "7."

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "8."

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "9."

10. Admits the allegations set forth in paragraph "10."

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "11."

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "12."

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "13."

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "14."

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "15."

16. Paragraph “16” of the Fourth Party Complaint sets forth conclusions of law to which no response is required; to the extent a response is required, National Union denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “16.”

17. Paragraph “17” of the Fourth Party Complaint sets forth conclusions of law to which no response is required; to the extent a response is required, denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “17.”

18. Refers the Court to referenced pleading for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “18.”

19. Refers the Court to referenced pleading for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “19.”

20. Refers the Court to referenced pleading for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “20.”

21. Refers the Court to referenced pleading for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “21.”

22. Refers the Court to referenced pleading for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “22.”

23. Refers the Court to referenced pleading for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "23."

24. Refers the Court to the ad damnum filed by the Dormitory Authority of the State of New York, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "24."

25. Refers the Court to referenced subcontract for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "25."

26. Refers the Court to referenced bonds for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "26."

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "27."

28. Refers the Court to referenced contract for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "28."

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "29."

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "30."

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "31."

**FIRST COUNT**

32. In response to the allegations set forth in paragraph "32," repeats and realleges National Union's response to each and every allegation set forth in paragraphs "1" through "32" of the Fourth-Party Complaint as if more fully set forth herein.

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "33."

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "34."

35. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "35."

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "36."

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "37."

38. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "38."

39. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "39."

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "40."

## **SECOND COUNT**

**41.** In response to the allegations set forth in paragraph “41,” repeats and realleges National Union’s response to each and every allegation set forth in paragraphs “1” through “40” of the Fourth Party Complaint as if more fully set forth herein.

**42.** Refers the Court to the referenced bond for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “42.”

**43.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “43.”

**44.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “44.”

## **THIRD COUNT**

**45.** In response to the allegations set forth in paragraph “45,” repeats and realleges National Union’s response to each and every allegation set forth in paragraphs “1” through “44” of the Fourth Party Complaint as if more fully set forth herein.

**46.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “46.”

**47.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “47.”

**48.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “48.”

**49.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “49.”

**50.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “50.”

**51.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “51.”

#### **FOURTH COUNT**

**52.** In response to the allegations set forth in paragraph “52,” repeats and realleges National Union’s response to each and every allegation set forth in paragraphs “1” through “51” of the Fourth Party Complaint as if more fully set forth herein.

**53.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “53.”

**54.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “54.”

**55.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “55.”

**56.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “56.”

**57.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “57.”

**58.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “58.”

**59.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "59."

#### **FIFTH COUNT**

**60.** In response to the allegations set forth in paragraph "60," repeats and realleges National Union's response to each and every allegation set forth in paragraphs "1" through "59" of the Fourth Party Complaint as if more fully set forth herein.

**61.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "61."

**62.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "62."

**63.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "63."

**64.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "64."

**65.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "65."

**66.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "66."

**67.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "67."

**SIXTH COUNT**

68. In response to paragraph "68," repeats and realleges National Union's response to each and every allegation set forth in paragraphs "1" through "67" of the Fourth Party Complaint as if more fully set forth herein.

69. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "69."

70. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "71."

71. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "71."

72. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "72."

73. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "73."

74. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "74."

75. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "75."

76. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "76."

**SEVENTH COUNT**

**77.** In response to paragraph “77” of the Fourth-Party Complaint, repeats and realleges National Union’s response to each and every allegation set forth in paragraphs “1” through “76” above as if more fully set forth herein.

**78.** Admits that National Union issued one or more policies of umbrella liability insurance (the “National Union Policies”) to Trataros Construction, refers the Court to the National Union Policies for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “78.”

**79.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “79.”

**80.** Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph “80.”

**81.** Denies the allegations set forth in paragraph “81” as to National Union and/or the National Union Policies.

**82.** Denies the allegations set forth in paragraph “82” as to National Union and/or the National Union Policies.

**83.** Denies the allegations set forth in paragraph “83” as to National Union and/or the National Union Policies.

**84.** Denies that Fourth-Party Plaintiffs are entitled to any relief, declaratory or otherwise, as respects National Union or the National Union Policies, and otherwise denies knowledge or information sufficient to form a belief as to what these entities “request” or the truth of the remaining allegations in paragraph “84.”

**AFFIRMATIVE DEFENSES**

**AS AND FOR A FIRST DEFENSE**

The Fourth Party Complaint fails to state a claim upon which relief may be granted against National Union.

**AS AND FOR A SECOND DEFENSE**

The Fourth Party Complaint fails to present a justiciable controversy as to National Union.

**AS AND FOR A THIRD DEFENSE**

No coverage is available under the National Union Policies unless and until Fourth-Party Plaintiffs demonstrate proper exhaustion of all applicable underlying insurance and/or retentions, a condition precedent to coverage under the National Union Policies.

**AS AND FOR A FOURTH DEFENSE**

The National Union Policies requires that all Scheduled Underlying Insurance be maintained in full force and effect; to the extent this condition is not complied with, National Union's obligations under the National Union Policies, if any, can be no greater than those which would exist had these this condition been complied with.

**AS AND FOR A FIFTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred may be barred in whole or in part by the terms, conditions, exclusions and limitations of the National Union Policies.

**AS AND FOR A SIXTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by their failure to mitigate, minimize or avoid the alleged injuries for which they are answerable.

**AS AND FOR A SEVENTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by any failure to provide National Union with timely and proper notice of an occurrence, claim or suit, as per the National Union Policies.

**AS AND FOR AN EIGHTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by the doctrine of unclean hands.

**AS AND FOR A NINTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by any impairment of National Union's right to subrogation, indemnity or contribution.

**AS AND FOR A TENTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by the applicable statute of limitations, by estoppel, and/or through laches.

**AS AND FOR AN ELEVENTH DEFENSE**

National Union may be entitled to assert any applicable terms, conditions, exclusions and other language of underlying insurance policies in response to the claims at issue.

**AS AND FOR A TWELFTH DEFENSE**

National Union's obligations, if any, under the National Union Policies are subject to the applicable limits of liability set forth therein.

**AS AND FOR A THIRTEENTH DEFENSE**

The National Union Policies are not obligated to "drop down" and/or assume the obligations of an insured and/or other insurers as to underlying insurance.

**AS AND FOR A FOURTEENTH DEFENSE**

Coverage under the National Union Policies is limited to, *inter alia*, claims for damages arising from “Property Damage” caused by an “Occurrence,” which is defined as “an accident.”

**AS AND FOR A FIFTEENTH DEFENSE**

Any “Property Damage” which was “expected or intended from the standpoint of the insured” is excluded under the National Union Policies.

**AS AND FOR A SIXTEENTH DEFENSE**

National Union’s obligations under the National Union Policy are excess to any other policy of insurance providing coverage for damages covered in whole or in part by the National Union Policies, other than insurance written specifically as excess to the National Union Policies.

**AS AND FOR A SEVENTEENTH DEFENSE**

No coverage is available under the National Union Policies\y for any “bodily injury” arising out of any project insured under a “wrap-up” or similar rating plan.

**AS AND FOR AN EIGHTEENTH DEFENSE**

No coverage is available under the National Union Policy to any natural person or entity not an insured thereunder.

**AS AND FOR A NINETEENTH DEFENSE**

No coverage may be available under the National Union Policies for property damage arising out of any project insured under a “wrap-up” or any similar rating plan.

**AS AND FOR A TWENTIETH DEFENSE**

No coverage is available under the National Union Policies for any liability arising from an insured's breach of a contract to provide insurance for another natural person or entity and/or any failure to name such a person or entity as an insured to an insurance policy.

**AS AND FOR A TWENTY-FIRST DEFENSE**

No coverage is available under the National Union Policies for damage to "Impaired Property," as that term is defined therein.

**AS AND FOR A TWENTY-SECOND DEFENSE**

No coverage is available under the National Union Policies for damage to an insured's "Work" which is included in the "Products-Completed Operations Hazard," as those terms are defined therein.

**AS AND FOR A TWENTY-THIRD DEFENSE**

No coverage is available under the National Union Policies for damage to an insured's "Product," as that term is defined therein.

**AS AND FOR A TWENTY-FOURTH DEFENSE**

No coverage is available under the National Union Policies for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal and/or disposal of an Insured's "Product" or "Work" or "Impaired Property," as those terms are defined therein, if such product, work or property is withdrawn from use because of a known or suspected deficiency, defect, or inadequacy with respect thereto.

**AS AND FOR A TWENTY-FIFTH DEFENSE**

No coverage may be available under the National Union Policies for property damage to property being installed, erected or worked upon by an insured, or its agents or subcontractors.

**AS AND FOR A TWENTY-SIXTH DEFENSE**

No coverage may be available under the National Union Policies for property damage arising out of any professional services rendered by or on behalf of an insured.

**AS AND FOR A TWENTY-SEVENTH DEFENSE**

National Union may have additional defenses that cannot be articulated due to the generality of the Fourth Party Complaint, Fourth Party Plaintiffs' failure to meet their obligation to provide information about the underlying actions or claims, the absence of insuring documents, or the stage of this litigation. Accordingly, National Union reserves its right to supplement the foregoing and to assert additional defenses as may appear after Fourth Party Plaintiffs particularize their claims, and after discovery of information concerning the matters set forth in the Fourth Party Complaint.

**ANSWER TO CROSS-CLAIMS OF FOURTH-PARTY DEFENDANT  
U.S. FIRE INSURANCE COMPANY**

National Union denies the first and second cross-claims asserted by Fourth Party Defendant U.S. Fire Insurance Company in their entirety and, to the extent applicable, incorporates the foregoing affirmative defenses by reference.

**ANSWER TO CROSS-CLAIMS OF FOURTH-PARTY DEFENDANT  
ZURICH-AMERICAN INSURANCE COMPANY**

National Union denies the first cross-claim asserted by Fourth Party Defendant Zurich-American Insurance Company in its entirety and, to the extent applicable, incorporates the foregoing affirmative defenses by reference.

**ANSWER TO ALL OTHER CROSS-CLAIMS**

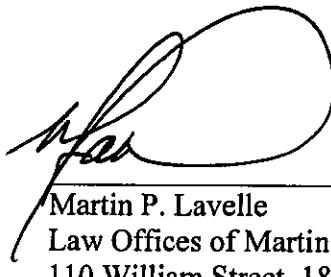
National Union denies all other cross-claims asserted against it and, except as may be inconsistent with the foregoing, denies each and every allegation in support thereof, and, to the extent applicable, incorporates the foregoing affirmative defenses by reference.

WHEREFORE, National Union seeks judgment dismissing the Fourth Party Complaint against it with prejudice, along with such other and further relief as this Court deems just and proper.

**JURY DEMAND**

National Union demands a trial by jury as to any issues so triable.

New York, New York  
May 4, 2005



Martin P. Lavelle  
Law Offices of Martin P. Lavelle  
110 William Street, 18<sup>th</sup> Floor  
New York, New York 10038  
(212) 266-5880

*Attorneys for Fourth-Party Defendant  
National Union Fire Insurance Company of  
Pittsburgh, PA*